

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HILLCREST ESTATES DEVELOPMENT CO.</b>	:	DETERMINATION
for Revision of a Determination or for Refund	:	DTA NO. 814357
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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Petitioner, Hillcrest Estates Development Co., c/o Rabco Development, Inc., 6610 Thornton Place, Rego Park, New York 11374, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On February 28, 1997, petitioner by its duly authorized representative, Howard M. Koff, P.C. (Howard M. Koff, Esq., of counsel), and the Division of Taxation by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel) waived a hearing and agreed to have this matter determined based upon documents and briefs to be submitted by June 27, 1997, which date commenced the six-month period for the issuance of this determination (Tax Law § 2010[3]). After review of the entire record on submission, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether a Notice of Determination issued against petitioner after petitioner's failure to make an installment payment of tax when due must be cancelled because it was issued more than three years after the underlying property transfer date.

***FINDINGS OF FACT<sup>1</sup>***

1. On May 24, 1989 petitioner, Hillcrest Estates Development Co., transferred its interest

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<sup>1</sup>On February 28, 1997 and March 30, 1997, respectively, the parties by their representatives entered into a stipulation of relevant facts. These stipulated facts are included in the Findings of Fact herein.

in real property located at 71st Avenue and Parsons Boulevard, Queens, New York to P.H. Development Corp. Prior to this transfer, petitioner and P.H. Development Corp. filed transferor and transferee questionnaires as required under the pre-transfer audit procedures of Tax Law former Article 31-B (the "gains tax").<sup>2</sup> These filings reported a gross consideration of \$25,300,000.00 for the transfer, taxable gain thereon of \$12,768,609.00, and gains tax due of \$1,276,860.90.

2. In response to petitioner's filing, the Division of Taxation ("Division") issued a Tentative Assessment and Return, dated May 15, 1989, with a Schedule of Adjustments. Such tentative assessment increased petitioner's taxable gain on the transfer to \$13,992,599.00, and its resulting gains tax liability to \$1,399,259.90.

3. Petitioner agreed with the Division's revisions and, in conjunction with its May 24, 1989 transfer of the property, filed a supplemental return requesting deferral such that its entire \$1,399,259.90 gains tax liability could be paid in installments over a three-year period. Petitioner's request to make installment payments was accepted by the Division on August 1, 1989, with each installment payment due on the May 24 anniversary date of the property transfer.

4. In May 1990, petitioner requested that the installment payment plan be expanded to 15 years. This request, resulting in annual payments of \$155,523.09 for each of the first three years, followed by annual payments of \$77,724.23 for the fourth through fifteenth years thereafter, was approved by the Division on May 9, 1990.

5. Petitioner paid the first two annual installments on May 24, 1990 and May 24, 1991, respectively, each in the amount of \$155,523.09. However, petitioner requested that the payment date for its May 24, 1992 installment be extended to August 15, 1992. By a letter dated July 2, 1992, the Division agreed to this request, noting however that such extension was not a permanent change in the due date for petitioner's installment payments and that if payment (including interest) was not made by August 15, 1992, the entire balance of tax would be

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<sup>2</sup>The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occurred on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

declared immediately due and payable with applicable penalties and interest.

6. Petitioner failed to make its installment payment by the August 15, 1992 extended due date. By a letter dated August 20, 1992, the Division denied petitioner's request for a further extension and requested immediate payment of the installment amount then due including accrued interest. Petitioner did not make such installment payment and, on September 17, 1992, the Division issued a Statement of Proposed Audit Adjustment advising that since petitioner had failed to pay its installment as required, the entire balance of tax (plus penalty and interest) was due and owing.

7. On November 23, 1992, the Division issued to petitioner a Notice of Determination assessing the entire balance of tax due in the amount of \$1,088,213.72, plus penalty and interest. The parties did not execute an extension agreement with respect to the period of limitations on assessment pursuant to Tax Law § 1444(3)(c).

8. The parties have specified, by their stipulation, that the only issue in this proceeding is whether the November 23, 1992 Notice of Determination issued against petitioner should be cancelled as untimely because it was issued more than three years after the May 24, 1989 property transfer date.

### ***CONCLUSIONS OF LAW***

A. Tax Law former § 1441, effective March 28, 1983, imposed a tax at the rate of 10 percent upon gains derived from the transfer of real property within New York State. In this case, there is no question that the transfer was subject to the tax, nor any question as to the amount of tax due or the date of the property transfer.

B. Tax Law former § 1442(a) provided, in part, that "[t]he tax imposed by [Article 31-B] shall be paid . . . no later than the fifteenth day after the date of transfer." (Emphasis added.) However, section 1442(c) further provided that a transferor could, in certain specified situations, elect to pay the tax on an installment basis rather than at the time of transfer. Said section thereafter detailed the manner in which the installment payments on the tax liability were to be made. There is no dispute that the circumstances of petitioner's transfer allowed

petitioner to elect to pay the gains tax liability thereon in installments over time.

C. In addition to the foregoing, Tax Law former § 1442(e) provided, in part, as follows:

"If the taxpayer shall fail to pay any such installment on the date on which it is due, the commissioner of taxation and finance may declare the entire unpaid balance of the tax due and owing." (Emphasis added.)

D. Upon its failure to make the installment payment due May 24, 1992, as extended until August 15, 1992, petitioner became subject to the provisions of Tax Law § 1442(e). The Division, in turn, moved to declare the entire unpaid balance of tax due and owing, and issued the Notice of Determination at issue herein. Petitioner's position is that such Notice of Determination is barred and must be cancelled because it was not issued within three years of the May 24, 1989 property transfer date. In support of its position, petitioner cites to Tax Law former § 1444(3)(a)(1) which provided, in relevant part, as follows:

"3. (a) Statute of limitations. (1) General. No assessment of additional tax under [Article 31-B] shall be made after the expiration of three years from the date of transfer. . . ." (Emphasis added.)

Petitioner argues that the Division should have issued a Notice and Demand under Tax Law former § 1444-a(2) instead of a Notice of Determination under Tax Law former § 1444(1). Petitioner maintains that former section 1444-a imposes no statute of limitations on the issuance of a Notice and Demand, whereas former section 1444 makes a Notice of Determination subject to the three-year limitations period set forth under Tax Law former § 1444(3)(a)(1).

E. Pursuant to Tax Law former § 1444(1), when a form (i.e., a return or report) required under Article 31-B is not filed, or is filed but is incorrect or insufficient, the Division may determine the amount of tax due from such information as is obtainable. The Division, in turn, shall give notice of its determination of the amount of tax due to the person liable for payment of the tax. The Division's determination shall become final and irrevocable unless the determination is protested within the 90-day time period specified in section 1444(1). Stated differently, the Division's right to determine additional tax due under Tax Law former § 1444(1) carries with it the taxpayer's right to be heard in protest to such determination, and the amount of additional tax so determined shall not be deemed assessed until expiration of the protest

period or until final disposition of any such protest. The Division's right to determine that additional tax is due, and to notify a taxpayer thereof, is clearly subject to the three-year statutory period of limitations set forth at Tax Law former § 1444(3)(a)(1). Simply put, the Division has a period of three years within which to determine and notify a taxpayer that additional tax is owed.<sup>3</sup>

In contrast, Tax Law former § 1444-a(1) provides that the amount of tax shown on a tentative assessment, including a tentative assessment filed with a supplemental return (as here), shall be deemed assessed on the date of the property transfer. Tax Law § 1444-a(2), entitled "Notice and demand for tax", provides that "[t]he commissioner of taxation and finance shall, as soon as practicable, give notice to each person liable for any amount of tax, penalty, interest penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof." Stated differently, Tax Law former section 1444-a(2) provides for the issuance of a notice demanding payment, in essence a bill for assessed but unpaid amounts. There is no period of limitations specified with respect to the issuance of such a notice and demand.

F. In this case, there is no question as to the amount of tax due, as shown on the supplemental return filed by petitioner, and such tax was deemed assessed on the May 24, 1989 property transfer date, in accordance with Tax Law former § 1444-a(1). In turn, when petitioner failed to make its installment payment due May 24, 1992, the Division was entitled under Tax Law former § 1442(e) to declare the entire unpaid balance due and owing -- that is to terminate petitioner's right to pay its assessed liability in installments over a period of years. It is clear from the dollar amount specified in the Notice of Determination issued to petitioner, and it is also undisputed, that the Division was not giving notice of any additional tax due by its issuance of the Notice of Determination, but rather was simply declaring the entire unpaid balance of tax (plus penalty and interest) to be immediately due and owing. Petitioner argues that because the

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<sup>3</sup>The term "additional" tax obviously means the amount of tax determined by the Division in excess of that calculated and reported by the taxpayer (i.e., the amount in excess of zero in cases where no return or report is filed by the taxpayer, or the amount in excess of the tax reported by the taxpayer on a filed return or report).

Division made its declaration via a notice of determination, such notice was subject to the three-year limitations period of Tax Law former § 1444(3)(a)(1). However, petitioner's reading of Tax Law former § 1444(3)(a)(1) gives no effect to the word "additional" therein. Petitioner's argument overlooks the fact that the notice in question does not assess any additional tax, but only seeks immediate payment of an already assessed but unpaid amount of tax. Tax Law former § 1444(3)(a)(1) only limits the period during which the Division can determine and notify a taxpayer that additional tax is due, thus bringing finality to the time frame within which the amount of tax due on a particular transfer can be reviewed and (potentially) increased. It should not be read to impose a limitation on the period during which the taxpayer can be held responsible to pay the assessed but unpaid tax due on a transfer. In this case, since no additional tax was imposed by the notice of determination, the statute of limitations is not applicable.

G. Petitioner's argument is, in essence, that the Division issued the wrong form -- that a notice and demand should have been issued instead of a notice of determination. It is clear that where the Division seeks additional tax it must, within three years of the property transfer date, issue a notice of determination and thereby afford the taxpayer the requisite protest rights against such additional tax. In this case the Division was not asserting any additional tax against petitioner, and it appears clear that the Division could have simply proceeded by issuing a notice and demand to petitioner. However, there is no apparent statutory bar to the Division's use of a notice of determination to notify a taxpayer that the entire unpaid balance of tax is due in the event of the taxpayer's failure to timely make an installment payment (see, Matter of Posner, Tax Appeals Tribunal, June 21, 1990). In fact, even accepting petitioner's argument that the notice of determination was the "wrong" form of notice to declare the remaining unpaid balance immediately due and owing, it remains that by such notice the Division sought no additional tax from petitioner and thus the statutory limitation period on assessment of additional tax does not come into play. Not only has petitioner pointed to no harm or prejudice from the Division's issuance of a notice of determination, but any such "prejudice" would seem

to inure to petitioner's benefit, since a notice of determination clearly carries with it the right to protest whereas a notice and demand carries no such explicit protest rights.<sup>4</sup> In any event, since the Division's Notice of Determination seeks no additional tax beyond that already assessed and unpaid, the statute of limitations on assessment under Tax Law former § 1444(3)(a)(1) does not serve as a bar requiring cancellation of the Notice of Determination issued to petitioner.

H. The petition of Hillcrest Estates Development Co. is hereby denied.

DATED: Troy, New York  
December 11, 1997

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>4</sup>While a notice and demand carries with it no explicit right to file a protest, such right has been found to exist based on Tax Law § 2006(4) (see, Matter of Meyers v. Tax Appeals Tribunal, 201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519; Matter of Jaffe, Tax Appeals Tribunal, September 21, 1995).